

DEPARTMENT OF SOCIAL SERVICES
744 P Street, Sacramento, CA 95814



June 28, 1979

ALL-COUNTY INFORMATION NOTICE I- 67-79

TO: ALL COUNTY WELFARE DIRECTORS

SUBJECT: IN-HOME SUPPORTIVE SERVICES (IHSS) -- ADVANCE PAYMENTS OF EARNED
INCOME CREDIT

REFERENCE:

The Revenue Act of 1978 provides for advance payments of earned income credit which becomes effective July 1, 1979. If you are payrolling IHSS providers and withholding federal income tax, please review the rules and regulations attached to determine applicability to your system.

State and federal income tax will not be withheld under the statewide IHSS payrolling system, therefore, it will not be necessary to adopt advance payments of earned income credit. The statewide IHSS payrolling system should be operational in January 1980.

For additional information, please contact:

Reggie Steele
IHSS Systems Section
Department of Social Services
744 P Street, M. S. 5-126
Sacramento, CA 95814
(916) 322-8097

Sincerely,

A handwritten signature in dark ink, appearing to read 'James H. Gomez', written over the typed name and title.
JAMES H. GOMEZ
Deputy Director

Attachment

cc: CWDA

Circular E (Supplement)

Employer's Tax Guide

General information on the new targeted-jobs tax credit and the WIN credit is included in this publication.

Also included is a corrected page 39, Social Security Employee Tax Table, for the November 1978 revision of Circular E, which had a typographical error.

This publication contains information for figuring, paying, accounting, and reporting the advance payments of the Earned Income Credit (EIC). These payments are to be made to eligible employees who choose to get advance payments along with their wages paid after June 30, 1979.

Form W-5, Earned Income Credit Advance Payment Certificate

An eligible employee who wants to receive advance EIC payments must file Form W-5 with his or her employer. This certificate must be filed each year by eligible employees. Two copies of Form W-5 are included at the end of this publication. Additional copies may be ordered from any IRS office. Employers must provide Forms W-5 to employees.

Forms 941, 941E, 942, and 943

Form 941, Employer's Quarterly Federal Tax Return; Form 941E, Quarterly Return of Withheld Income Tax; Form 942, Employer's Quarterly Tax Return for Household Employees; and Form 943, Employer's Annual Tax Return for Agricultural Employees, will be revised. Employers will be given credit for the total amount of advance EIC payments made during the tax return period against withheld income tax and FICA taxes reportable on the returns.

Form W-2, Wage and Tax Statement

The 1979 Form W-2 has a new box for reporting the advance EIC payments. The total amount of the advance EIC payments must be shown separately in this box. The amount of the advance EIC payments is not to be deducted from withheld income or FICA taxes reported on Form W-2.

Contents

Section number	Page number
1. Purpose	2
2. Eligible Employees	2
3. Form W-5	2
4. Computing the Advance EIC Payment	2
5. Paying the Advance EIC to Employees	2
6. Employer's Returns	2
7. Statements for Employees	3
8. Recordkeeping	3
Percentage Method Tables	3, 6-7
Wage Bracket Tables	3, 8-12
Information on Targeted-Jobs Credit	4
Information on WIN Credit	5
Copies of Form W-5 Corrected Page 39 for Circular E (Rev. 11-78) Bulletin Board Poster	

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Internal Revenue Service
Washington, DC 20224

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Advance Payment of Earned Income Credit

1. Purpose

This supplement tells how to figure, pay, report, and account for advance payments of the Earned Income Credit (EIC).

Employers must include the advance EIC payments with wages paid after June 30, 1979, to eligible employees who choose to get the advance payments.

2. Eligible Employees

Employees who want to receive advance EIC payments must first expect to be eligible for the EIC.

Eligibility for the EIC.—

- (a) The taxpayer's expected earned income and adjusted gross income must both be less than \$10,000.
- (b) If married, the employee must file a joint return.
- (c) The employee must not be able to exclude any income earned abroad or in U.S. possessions.
- (d) If not married, the employee must pay over half the cost of maintaining a household in the U.S.
- (e) The employee must have a child living with him or her full time except when the child is away at school or on vacation.
- (f) The child must be claimed as a dependent by the employee unless the employee qualifies for unmarried head of household filing status because of the child. If the employee qualifies for unmarried head of household filing status, the child need not be claimed as a dependent unless the child is married as of the end of the year.

These requirements are shown on Form W-5, which the employee must complete.

Getting Advance Payments of the EIC.—An employee who wants advance EIC payments must file Form W-5, Earned Income Credit Advance Payment Certificate, with his or her employer. An eligible employee who does not file Form W-5 will not receive any advance payment. However, an employee who chooses not to get advance payment will still get the full benefit of the EIC on his or her annual tax return.

3. Form W-5

Form W-5, Earned Income Credit Advance Payment Certificate, must

be filed by an eligible employee with an employer before any advance EIC payment can be made.

On Form W-5 (two copies of which are included in the back of this circular) employees must show if they are married and if their spouse has a Form W-5 in effect for the year with an employer.

If the employee shows that his or her spouse has filed a Form W-5 with an employer, use the payroll period table (either the wage bracket or percentage method) titled "Married with both spouses filing certificate."

Form W-5 remains in effect until the end of the calendar year. Eligible employees must file a new certificate each year.

Make the signed form effective with the first payroll period ending (or the first wage payment made without regard to a payroll period) on or after the date the certificate is given to you. (For 1979 this is not effective for wage payments made before July 1, 1979.)

If, after an employee has given you a signed Form W-5, circumstances change which make the employee ineligible for the credit or the employee's spouse files a Form W-5, the employee must, within ten days after such change, either revoke the previously filed form or file a new Form W-5 showing that his or her spouse has a Form W-5 in effect with an employer.

If an employee has a Form W-5 certifying that his or her spouse has a Form W-5 in effect, and the spouse ceases to have a form in effect, the employee may file a new Form W-5 with the employer which certifies that the spouse does not have a Form W-5 in effect.

4. Computing the Advance Payment of the EIC

Employers must include the advance EIC payment with wages paid after June 30, 1979, to eligible employees who have filed Form W-5.

Generally, wages for purposes of the advance EIC payment mean amounts subject to income tax withholding. For employees who have claimed exemption from income tax withholding on Form W-4, Employee's Withholding Allowance Certificate, wages mean amounts that would have been subject to income tax withholding.

For domestic and agricultural employees, wages mean amounts subject to FICA (social security) taxes.

To determine the amount of the advance payment, take into account:

- (a) wages paid—including tips reported, and
- (b) whether a married employee's spouse has a Form W-5 in effect with an employer. There are separate tables for married employees whose spouses have a certificate in effect.

Figure the amount of the payment to include in eligible employees' wage payments by using the tables beginning on page 6. Be sure to use the right table for married employees.

5. Paying the Advance EIC to Employees

The advance EIC payment does not change the amount of income tax or FICA (social security) taxes that you withhold from employees' wages and pay over to the IRS. The advance EIC payment is not compensation for services rendered and is not subject to payroll taxes.

Generally, employers will pay the amount of the advance EIC payment from withheld income taxes and FICA taxes. These taxes are normally required to be paid over to the IRS either through Federal Tax Deposits (FTD's) or with employment tax returns.

If for any payroll period the advance EIC payments are more than the withheld income tax and the FICA taxes (including the employer's share of FICA tax), the employer may—

- (a) Reduce each advance EIC payment proportionately. (Each payment shall be reduced by an amount that has the same ratio to such excess as such payment has to the total of all advance payments for the payroll period.) OR
- (b) Elect to make full payment of the advance EIC amount and have such full amounts treated as an advance payment of the employer's tax liability. If excess EIC payments are applied against any other taxes, attach an explanation to that tax return on which the credit for overpayment is taken.

6. Employer's Returns

As stated above, the amount of the advance EIC payment does not

change the amount the employer must deduct and withhold from employees' pay for income tax and employee FICA taxes. Advance EIC payments made by the employer to employees shall be treated as made from amounts withheld as income tax, employee FICA taxes, and employer FICA taxes. Furthermore, the amounts of the advance EIC payments are treated as if the employer had paid over the amount of the advance EIC payment to IRS on the day the wages are paid to employees.

Employers will take the amount of advance EIC payments into account on their employment tax returns, Forms 941, 941E, 942, or 943.

On employment tax returns where there is a Record of Federal Tax Deposits (i.e. Forms 941, 941E, and 943) employers must show the amount of these payments in the Record of Federal Tax Deposits. The same rules that require employers to show the tax liability for a specific time period apply for showing the amounts of the advance payments. If an employer must show the tax liability for each quarter-monthly period, the employer must show the amount of the advance payments for each quarter-monthly period. Similarly, if the employer's total tax liability, before any consideration is given to advance payments of the EIC, for any month is less than \$2,000, the employer may show the total advance payments of the EIC on the "total" line for that month.

On Form 942, Employer's Quarterly Tax Return for Household Employees, where there is no Record of Federal Tax Deposits, employers are to show the total payments on the line "Advance EIC payments."

Employers who fail to make an advance EIC payment, as required, are subject to penalties.

Note: State and local government employers, who have entered into a

section 218 agreement with the Secretary of Health, Education, and Welfare for social security coverage, cannot use the social security payments to make the advance EIC payments.

Employers in Guam and the U.S. Virgin Islands should consult their local tax office for information on the earned income credit. These employers cannot take into account the advance EIC payments on Form 941SS.

7. Statements for Employees

Employers must show the total amount of advance EIC payments made during the year on the employee's Form W-2, Wage and Tax Statement. On the 1979 Form W-2, this is to be shown in box 6.

The amounts shown on Form W-2 for income tax withheld (if any) and FICA tax withheld are not affected by any advance EIC payments. Likewise, no other entries on Form W-2 are changed because of these payments.

8. Recordkeeping

Keep for 4 years all records of advance EIC payments. These should be available for IRS review. Records should include:

- Copies of employees' Form W-5
- Amounts and dates of all wage payments and advance EIC payments
- Dates of each employee's employment
- Dates and amounts of tax deposits made
- Copies of returns filed

Advance Payment Tables

A Percentage Method

If you use the wage bracket tables on pages 8 through 12, you may skip this section.

If you don't want to use the wage bracket tables to figure how much to include in an employee's wages for the advance EIC payment, you can use the percentage computation based on the appropriate rate table.

Find the employee's gross wages before any deductions in the appropriate table on pages 6 and 7. Please note that there are tables for the same payroll periods that are used for percentage method income tax withholding in Circular E, Employer's Tax Guide (Revised November 1978). There are different tables for (a) single or married employees without spouse filing a certificate, and (b) married employees with both spouses filing certificates. Determine the amount of the advance EIC payment shown in the appropriate table for the amount of wages paid.

B Wage Bracket Method

If you use the wage bracket tables on pages 8 through 12, figure the advance EIC payment as follows.

Find the employee's gross wages, before any deductions, in the appropriate table. There are tables for the same payroll periods that are used for wage bracket income tax withholding in Circular E, Employer's Tax Guide (Revised November 1978). There are different tables for (a) single or married employees without spouse filing a certificate and (b) married employees with both spouses filing certificates. Determine the amount of the advance EIC payment shown in the appropriate table for the amount of wages paid.

Using either method, the number of withholding allowances an employee claims on Form W-4, Employee's Withholding Allowance Certificate, is not used in figuring the advance EIC payment. Nor does it matter that the employee has claimed exemption from income tax withholding on Form W-4.

You may use other methods and kinds of tables for figuring advance EIC payments as long as the amount of the payment is about the same as it would be using the tables in this circular. See page 14 of Circular E (Rev. 11-78) for maximum tolerance allowed.

Tables for Percentage Method of Advance EIC Payments

Table 1. WEEKLY Payroll Period

(a) SINGLE or MARRIED Without Spouse Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$96	10% of wages
\$96	\$115	\$9.60
\$115	. . . . .	\$9.60 less 12.5% of wages in excess of \$115

(b) MARRIED With Both Spouses Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$48	10% of wages
\$48	\$58	\$4.80
\$58	. . . . .	\$4.80 less 12.5% of wages in excess of \$58

Table 2. BIWEEKLY Payroll Period

(a) SINGLE or MARRIED Without Spouse Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$192	10% of wages
\$192	\$231	\$19.20
\$231	. . . . .	\$19.20 less 12.5% of wages in excess of \$231

(b) MARRIED With Both Spouses Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$96	10% of wages
\$96	\$115	\$9.60
\$115	. . . . .	\$9.60 less 12.5% of wages in excess of \$115

Table 3. SEMIMONTHLY Payroll Period

(a) SINGLE or MARRIED Without Spouse Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$208	10% of wages
\$208	\$250	\$20.80
\$250	. . . . .	\$20.80 less 12.5% of wages in excess of \$250

(b) MARRIED With Both Spouses Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$104	10% of wages
\$104	\$125	\$10.40
\$125	. . . . .	\$10.40 less 12.5% of wages in excess of \$125

Table 4. MONTHLY Payroll Period

(a) SINGLE or MARRIED Without Spouse Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$417	10% of wages
\$417	\$500	\$41.70
\$500	. . . . .	\$41.70 less 12.5% of wages in excess of \$500

(b) MARRIED With Both Spouses Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$208	10% of wages
\$208	\$250	\$20.80
\$250	. . . . .	\$20.80 less 12.5% of wages in excess of \$250

Table 5. QUARTERLY Payroll Period

(a) SINGLE or MARRIED Without Spouse Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$1,250 . .	10% of wages
\$1,250	\$1,500 . .	\$125.00
\$1,500	.....	\$125.00 less 12.5% of wages in excess of \$1,500

(b) MARRIED With Both Spouses Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$625 . . .	10% of wages
\$625	\$750 . . .	\$62.50
\$750	.....	\$62.50 less 12.5% of wages in excess of \$750

Table 6. SEMIANNUAL Payroll Period

(a) SINGLE or MARRIED Without Spouse Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$2,500 . .	10% of wages
\$2,500	\$3,000 . .	\$250.00
\$3,000	.....	\$250.00 less 12.5% of wages in excess of \$3,000

(b) MARRIED With Both Spouses Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$1,250 . .	10% of wages
\$1,250	\$1,500 . .	\$125.00
\$1,500	.....	\$125.00 less 12.5% of wages in excess of \$1,500

Table 7. ANNUAL Payroll Period

(a) SINGLE or MARRIED Without Spouse Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$5,000 . .	10% of wages
\$5,000	\$6,000 . .	\$500.00
\$6,000	.....	\$500.00 less 12.5% of wages in excess of \$6,000

(b) MARRIED With Both Spouses Filing Certificate

If the amount of wages (before deducting withholding allowances) is:		The amount of payment to be made shall be:
Over—	But not over—	
\$0	\$2,500 . .	10% of wages
\$2,500	\$3,000 . .	\$250.00
\$3,000	.....	\$250.00 less 12.5% of wages in excess of \$3,000

Table 8. DAILY or MISCELLANEOUS Payroll Period

(a) SINGLE or MARRIED Without Spouse Filing Certificate

If the wages divided by the number of days in such period (before deducting withholding allowances) are:		The amount of payment to be made shall be the following amount multiplied by the number of days in such period:
Over—	But not over—	
\$0	\$19.20 . .	10% of wages
\$19.20	\$23.10 . .	\$1.92
\$23.10	.....	\$1.92 less 12.5% of wages in excess of \$23.10

(b) MARRIED With Both Spouses Filing Certificate

If the wages divided by the number of days in such period (before deducting withholding allowances) are:		The amount of payment to be made shall be the following amount multiplied by the number of days in such period:
Over—	But not over—	
\$0	\$9.60 . .	10% of wages
\$9.60	\$11.50 . .	\$.96
\$11.50	.....	\$.96 less 12.5% of wages in excess of \$11.50

on the basis of the earned income derived by that spouse (without regard to community income laws). Otherwise, the limitation is computed as provided in § 5b.913-4—that is, on the basis of the combined earned income of both spouses unless they maintain separate abodes.

(c) *Cost-of-living differential.* Except as provided in paragraph (g) of this section, only one cost-of-living differential is permitted for the couple. If separate returns are filed, each spouse's cost-of-living differential equals one-half of the differential computed for the couple.

(d) *Qualified housing expenses—(1) Expenses.* Except as provided in paragraph (g) of this section, a married couple may claim qualified housing expenses with respect to only one abode.

(2) *Base housing amount.* If separate returns are filed and both spouses claim the section 913 deduction, the base housing amount for purposes of the separate return of each spouse is computed as provided in § 5b.913-6(c), except that it is to be computed solely on the basis of the earned income derived by that spouse (without regard to community income laws). The aggregate of the qualified housing expenses which may be claimed on separate returns may not exceed, however, the amount which would be computed for the couple if a joint return were filed. If separate returns are not filed or if both spouses do not claim the section 913 deduction, the base housing amount is computed as provided in § 5b.913-6(c)—that is, on the basis of the combined earned income of both spouses unless they maintain separate abodes.

(e) *Qualified home leave transportation expenses.* Pursuant to § 5b.913-8(b)(3), a married couple may not include as qualified home leave transportation expenses the cost of more than one round trip for each spouse or dependent during each period of 12 consecutive months during which the couple's tax home is in a foreign country, even though both spouses independently qualify under § 5b.913-2 (a) for the section 913 deduction.

(f) *Hardship area amount and joint returns.* Subject to the rules of § 5b.913-9, each spouse may claim a hardship area amount. If joint returns are filed, however, the hardship area amount determined for each spouse may not exceed the foreign earned income limitation computed as provided in § 5b.913-4, except that it is to be computed solely on the basis of the earned income derived by that spouse

(without regard to community income laws).

(g) *Separate tax homes—(1) In general.* A married couple that maintains separate abodes may claim a cost-of-living differential and qualified housing expenses with respect to each abode if—

(i) The abodes are not within a reasonable commuting distance of each other; and

(ii) The spouses have different tax homes which are not within a reasonable commuting distance of each other.

(2) *Joint returns.* If under paragraph (g) (1) a cost-of-living differential or qualified housing expenses are claimed with respect to the separate abode of each spouse and a joint return is filed, the aggregate of the following amounts may not exceed the foreign earned income limitation computed as provided in § 5b.913-4 solely on the basis of the earned income derived by each spouse (without regard to community income laws):

(i) The cost-of-living differential determined as provided in § 5b.913-5 with respect to that spouse's tax home;

(ii) The qualified housing expenses incurred with respect to that spouse's abode determined by using a base housing amount computed as provided in § 5b.913-6 (c) solely on the basis of the earned income derived by that spouse (without regard to community income laws); and

(iii) The hardship area amount for that spouse.

§ 5b.913-11 Married couples with community income.

(a) *Joint return.* Married couples with community earned income who file a joint return must compute their section 913 deduction under the rules of §§ 5b.913-1 through 5b.913-10. Where relevant, those rules instruct taxpayers with community income to disregard community income laws and treat the income earned by each spouse solely as that spouse's income.

(b) *Separate returns.* Married couples with community earned income (other than taxpayers to whom section 879 applies) who file separate returns must first compute the section 913 deduction as if they filed a joint return. One-half of that amount is the section 913 deduction to be claimed by each spouse on a separate return.

§ 5b.913-12 Returns and extensions.

See § 5b.911-6 (b) relating to returns and extensions for taxpayers qualifying for the section 913 deduction.

§ 5b.913-13 Effective date.

Sections 5b.913-1 through 5b.913-12 apply to taxable years beginning after December 31, 1978. Those sections also apply to the taxable year beginning during 1978 of taxpayers who do not make an election pursuant to section 209 (c) of the Foreign Earned Income Act of 1978 (Pub. L. No. 95-615, 92 Stat. 3109) to have section 913 under prior law apply to that taxable year.

There is need for immediate guidance with respect to the provisions contained in this Treasury decision. For this reason, it is found impracticable to issue it with notice and public procedure under subsection (b) of section 553 of Title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

This Treasury decision is issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805) and, in part, under the authority contained in section 913(m) of the Code (92 Stat. 3108; 26 U.S.C. 913(m)).

Jerome Kurtz,

Commissioner of Internal Revenue.

Approved: May 2, 1979.

Donald C. Luskick,

Assistant Secretary of the Treasury.

(T.D. 7817)

[FR Doc. 79-14400 Filed 5-9-79; 12:08 pm]

BILLING CODE 4830-01

26 CFR Part 38

Employment Taxes; Temporary Employment Tax Regulations Under the Revenue Act of 1978; Advance Payments of Earned Income Credit

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains Temporary Employment Tax Regulations relating to the advance payment by employers of the earned income credit and relating to earned income credit advance payment certificates, as provided by section 3507 of the Internal Revenue Code of 1954. Changes to the applicable tax law were made by the Revenue Act of 1978. The regulations would provide employees eligible for advance payments of earned income credit and their employers with the guidance needed to comply with the net law. The rules contained in the temporary regulations set forth in this document also serve as a notice of proposed rulemaking by which the rules contained therein are proposed to be prescribed as final regulations.

DATES: These temporary regulations are effective with respect to wages paid after June 30, 1979. Written comments and requests for a public hearing must be delivered or mailed on or before July 9, 1979.

ADDRESS: Send comments and requests for a public hearing to: Commissioner of Internal Revenue, Attention: CC:LR:T (LR-188-78), Washington, D.C. 20224.

FOR FURTHER INFORMATION CONTACT: Eileen Murphy of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. 20224 (Attention: CC:LR:T) (202-566-3297).

SUPPLEMENTARY INFORMATION

Background

This document contains temporary regulations under section 3507 of the Internal Revenue Code of 1954, as added by section 105 (b) of the Revenue Act of 1978 (Pub. L. 95-600), which are necessary to conform the regulations.

The regulations promulgated in this document are also proposed to be prescribed as final Employment Tax Regulations (26 CFR Part 38) under section 3507 of the Internal Revenue Code of 1954.

Advance Payments of Earned Income Credit

Prior to enactment of section 105(b) of the Revenue Act of 1978, section 43 of the Internal Revenue Code of 1954 provided an earned income credit which could only be claimed and received by an eligible individual as a credit on an income tax return. Section 105(b) of the Act (which added section 3507 to the Code) changed the manner by which an eligible individual may receive the amount of the earned income credit. Although the eligible individual must still file a tax return for the year in which the credit is claimed, the new provisions allow an eligible individual to receive at the end of each payroll period during the year a ratable portion (the "advance earned income credit amount") of the earned income credit for the year. The temporary regulations provide rules for determination and payment by employers of advance earned income credit amounts. Every employer paying wages after June 30, 1979, to an employee with respect to whom an earned income credit advance payment certificate is in effect must, at the time of paying the wages, also pay the employee the earned income advance amount of that employee. For eligible employees subject to income tax withholding, the advance payment is

based on the amount of wages subject to withholding; for employees not subject to withholding, but subject to FICA taxes, the payment is based on the amount of wages subject to FICA taxes. The advance earned income credit amount is determined by reference to prescribed advance amount tables. Payment of the advance earned income credit amount by the employer is credited on a dollar-for-dollar basis against the employer's liability for income tax withholding and FICA taxes. If advance amounts paid exceed this liability for the payroll period, the employer may either ratably reduce each advance amount paid or elect to pay the full advance amounts, with the excess amount treated as an advance payment of the employer's liability for income tax withholding, employee FICA taxes, and employer FICA taxes, in that order of priority. The employer takes any earned income advance amounts into account on the employer's Form 941, 941E, 942, or 943.

Earned Income Credit Advance Payment Certificates

The temporary regulations also provide rules prescribing the form and contents of the earned income credit advance payment certificate, rules relating to the employee's furnishing the certificate to the employer, and the period for which the certificate is effective. Form W-5 is the prescribed form for the earned income credit advance payment certificate. This form includes instructions to aid employees in determining whether they are eligible for advance earned income credit payments from their employers. The period for which a certificate first becomes (or ceases to be) effective depends on whether a previous certificate is or has been in effect with the employer for that employee for the calendar year. Rules are also provided for the revocation of a certificate and for the furnishing of a new certificate, necessitated by a change in the circumstances of the employee.

Waiver of Procedural Requirements of Treasury Directive

There is need for expeditious adoption of the provisions contained in this document because of the need for immediate guidance to employers and employees to whom section 3507 applies in ascertaining the proper amounts to be paid employees eligible for the advance payment of earned income credit. For this reason, Jerome Kurtz, Commissioner of Internal Revenue, has determined that the provisions of paragraphs 8 through 14 of the Treasury Department directive

implementing Executive Order 12044 must be waived.

Comments and Requests for a Public Hearing

Before adoption of the final regulations proposed in this document, consideration will be given to any written comments that are submitted (preferably six copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the Federal Register.

Drafting Information

The principal author of these regulations is Eileen Murphy of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulation both on matters of substance and style.

Adoption of Amendments to the Regulations

Accordingly, a new Part 38, Temporary Employment Tax Regulations under the Revenue Act of 1978, is added to Title 26 of the Code of Federal Regulations and the following temporary regulations are adopted.

§ 38.3507-1 Advance payments of earned income credit.

(a) *General rule*—(1) *In general.* Every employer paying wages after June 30, 1979, to an employee with respect to whom an earned income credit advance payment certificate is in effect must, at the time of paying the wages, also pay the employee the advance earned income credit amount of that employee. For the purposes of applying this section and § 38.3507-2—

(i) In the case of an individual who receives wages which are subject to income tax withholding, the term "employee" has the same meaning as set forth in section 3401(c) and the regulations thereunder, and the term "wages" has the same meaning as set forth in sections 3401(a) and 3402(e) and the regulations under those sections; and

(ii) In the case of an individual who does not receive wages which are subject to income tax withholding, but who receives wages which are subject to employee FICA taxes, the term

"employee" has the same meaning as set forth in section 3121(d) and the regulations thereunder and the term "wages" has the same meaning as set forth in section 3121(a) and the regulations thereunder.

An individual not having wages subject to either income tax withholding or employee FICA taxes is not entitled to advance payments of earned income credit.

(2) *Cross references.* For determination of the advance earned income credit amount of an employee, see paragraph (b) of this section. For rules relating to the treatment of the payment of an employee's advance earned income credit amount as equivalent to payment by the employer of withholding and FICA taxes, see paragraph (c) of this section. For rules describing the earned income credit advance payment certificate, see § 38.3507-2 (a) and (b). For rules relating to the employee's furnishing of the earned income credit advance payment certificate and the payroll periods for which the certificate is effective, see § 38.3507-2 (c) and (d).

(b) *Advance earned income credit amount.* The advance earned income credit amount of an employee is determined, with respect to any payroll period, on the basis of the employee's wages from the employer for the period and in accordance with the advance amount tables prescribed by the Commissioner of Internal Revenue and then in effect for the payroll period. See, however, paragraph (c) (2) of this section. The advance amount paid is reflected on the employee's W-2 form as a separate item (and neither as a reduction of withholding nor an increase in compensation). For purposes of applying this section and § 38.3507-2, the term "payroll period" has the meaning set forth in section 3401 (b) and the regulations thereunder. As required by section 3507(c)(2)(A), these advance amount tables must be similar in form to, and coordinated with, the tables prescribed under section 3402 (relating to income tax collected at the source). Sections 3507(c)(2)(B) and 3507(c)(2)(C) provide, respectively, separate rules for the treatment in the advance amount tables of the advance earned income credit of the following two separate classes of employees:

(1) Employees who are not married (within the meaning of section 143), or employees whose spouses do not have an earned income credit advance payment certificate in effect; and

(2) Employees whose spouses have an earned income credit advance payment certificate in effect.

(c) *Payment of advance earned income credit amount as payment of withholding and FICA taxes—(1) In general.* (i) The provisions of this paragraph (c) apply for all purposes of the Internal Revenue Code of 1954. Payments of advance earned income credit amounts pursuant to paragraph (a)(1) of this section do not constitute the payment of compensation. These payments by the employer are treated as made—

(A) First, from the aggregate amount, with respect to all employees, required to be deducted and withheld for the payroll period under section 3401 (relating to income tax withholding);

(B) Second, from the aggregate amount, with respect to all employees, required to be deducted for the payroll period under section 3102 (relating to employee FICA taxes); and

(C) Third, from the aggregate amount of the taxes imposed for the payroll period under section 3111 (relating to employer FICA taxes).

For purposes of the requirements of sections 3401, 3102, and 3111, as the case may be, and 6302, amounts equal to the advance earned income credit amounts paid to employees are treated as if paid to the Treasury Department on the day on which the wages (and advance amounts) are paid to the employees. The employer must report the payment and treatment of the advance amounts on the employer's Form 941, 941E, 942, or 943, as the case may be, in accordance with the applicable instructions.

(ii) The provisions of paragraph (c)(1)(i) of this section may be illustrated by the following example:

Example. Employer X has ten employees, each of whom is entitled to advance earned income credit payment of \$10. The total of advance amounts paid by the employer to the ten employees for the payroll period is \$100. The total of income tax withholding for the payroll period is \$90. The total of employee FICA taxes for the payroll period is \$61.30, and the total of employer FICA taxes for the payroll period is also \$61.30. Under the rules of paragraph (c)(1)(i) of this section, the total of advance amounts paid to employees is treated as if X had paid the Treasury Department on the day X paid the employees' wages: first, the \$90 aggregate amount of income tax withholding; and second, \$10 of the aggregate amount of employee FICA tax. X remains liable only for \$112.60 of the aggregate FICA tax [\$51.30 + \$61.30 = \$112.60].

(2) *Advance payments exceeding taxes due.* (i) If, for any payroll period, the aggregate amount of advance earned income credit amounts required to be paid by an employer under paragraph

(a)(1) of this section exceeds the sum of the amounts for the payroll period referred to in paragraphs (c)(1)(i) (A) through (C) of this section, the employer reduces each advance amount paid for the payroll period by an amount which bears the same ratio to the excess of the advance amounts as the subject advance amount bears to the aggregate of advance amounts for the payroll period. However, this paragraph (c)(2) does not apply if the employer makes the election provided by paragraph (c)(3) of this section.

(ii) The provisions of paragraph (c)(2) of this section may be illustrated by the following example.

Example. Assume the same facts as the example in paragraph (c)(1)(ii) of this section, except that the employer is a state government which does not pay FICA taxes. Under these facts, the advance amounts would be \$10 greater than the \$90 total of income tax withholding for the payroll period. Assume 10 employees each receiving \$10 in advance payments. Under the rule of this paragraph (c)(2), the employer X reduces the amount of the advance amount paid to each employee by $\frac{1}{10}$, computed as follows: $\$10/\$100 = \frac{1}{10}$. This is the same result as would be obtained by reducing the advance payment of \$10 for each of the ten employees by one-tenth $10/100$ of the \$10 excess or \$1.00.

(3) *Election to treat excess amounts as advance tax payment.* In lieu of reducing advance payments under paragraph (c)(2) of this section, an employer may elect under this paragraph (c)(3) to pay in full all advance earned income credit amounts. However, if no election is made, the employer is required to reduce advance amounts paid in accordance with paragraph (c)(2) of this section. The election, if made, applies to all advance earned income credit amounts required to be paid for the payroll period. The employer reflects the election on the employer's Form 941, 941E, 942, or 943 as the case may be, and must specify (with supporting computations) the amount of the excess of advance amounts paid and the payroll period to which the excess relates. Separate elections may be made for separate payroll periods. The excess of advance amounts paid is treated as an advance payment by the employer of employment taxes described in subdivisions (i) through (iii) of this paragraph (c)(3) and due for the period reported on the Form 941, 941E, 942, or 943 which includes the payroll period during which the excess amounts were paid. The amount of the excess advance payment is applied to the amounts of the employer's liability—

(i) First, for income tax withholding due under section 3401 for the reporting period in which the payment is made;

(ii) Second, for employee FICA taxes due under section 3102 for the reporting period in which the payment is made; and

(iii) Third, for employer FICA taxes due under section 3111 for the reporting period in which the payment is made. If the amount of the employment taxes (as described) for which the employer remains liable for the reporting period in which the excess payment is made is less than the excess payment, the employer may claim a refund of that portion of the excess amount paid which exceeds the employer's remaining liability for these taxes for the reporting period. This refund may be claimed, in the same manner as a refund of wage withholding taxes paid by the employer under section 3401, on the employer's Form 941, 941E, 942, or 943, as the case may be, for the reporting period. In the absence of a claim for refund, that portion of the excess amount will be applied by the Internal Revenue Service against the employer's liability for employment taxes reported on the employer's Form 941, 941E, 942, or 943, as the case may be, filed for the next reporting period.

(4) *Failure to make advance payments.* The failure to pay an employee, at the time required by paragraph (a)(1) of this section, all or any part of an advance earned income credit amount as required by this section is treated, for all purposes including penalties, as a failure by the employer as of that time to deduct and withhold under chapter 24 of the Internal Revenue Code of 1954 an amount equal to the advance amount (or part thereof) not paid. This treatment applies to the failure to pay an advance amount to an eligible employee without regard to whether—

(i) The employer is required, under section 3401 or 3102, to deduct any amounts from wages of the employee for the payroll period;

(ii) The employer paid the advance amount to the district director or deposited the advance amount with a duly designated depository of the United States and did not pay the advance amount to the employee as required by this section; or

(iii) The employee is ultimately not entitled to claim the earned income credit (in full or in part) on a return for the year, so long as the employee had a valid earned income credit advance payment certificate in effect with the

employer at the time when the wages were paid.

If an employer fails to pay an advance earned income credit amount as required under this section, the advance amount will not be collected by the Internal Revenue Service from the employer. However, the employer is liable for any penalties or additions to tax otherwise applicable in respect of the failure to pay the advance amount.

§ 38.3507-2 Earned income credit advance payment certificates.

(a) *Definition.* For the purposes of this section and § 38.3507-1, an earned income credit advance payment certificate is a statement furnished by an employee to the employer which—

(1) Certifies that the employee reasonably expects to be eligible to receive the earned income credit provided by section 43 for the employee's last taxable year under subtitle A of the Internal Revenue Code of 1954 which begins in the calendar year in which the wages are paid;

(2) Certifies that the employee does not have an earned income credit advance payment certificate in effect for the calendar year (in which the wages are paid) with respect to the payment of wages by another employer; and

(3) States if the employee's spouse has an earned income credit advance payment certificate in effect with any employer. For the rule for determining if an employee's spouse has a certificate in effect, see paragraph (c)(3) of this section.

(b) *Form and content of earned income credit advance payment certificate—(1) In general.* Form W-5 (Earned Income Credit Advance Payment Certificate) is the prescribed form for the earned income credit advance payment certificate. The Form W-5 must be prepared in accordance with the instructions applicable thereto and must set forth fully and clearly the data therein called for. In lieu of the prescribed form, a form the provisions of which are identical with those of the prescribed form may be used.

(2) *Invalid certificates.* A Form W-5 does not meet the requirements of section 3507 or this section and is invalid if it is not completed or signed or contains an alteration or unauthorized addition (as defined in § 31.3402(f)(5)-1 (b) (1) and (2)). Any earned income credit advance payment certificate which the employee clearly indicates to be false by oral statement or written statement to the employer must be treated by the employer as a certificate which is invalid as of the date of the employee's statement. For purposes of

the preceding sentence, the term "employer" includes any individual authorized by the employer to receive earned income credit advance payment certificates or to make payroll distributions. If an employer receives from an employee an invalid certificate, the employer must consider it a nullity with respect to all payments of wages thereafter to the employee and must inform the employee of the certificate's invalidity. The employer is not required to ascertain whether any completed and signed earned income credit advance payment certificate is correct. However, the employer should inform the district director if the employer has reason to believe that the certificate contains any incorrect statement.

(c) *When earned income credit advance payment certificate takes effect—(1) No previous certificate.* An earned income credit advance payment certificate furnished the employer where no previous certificate is or has been in effect with the employer for that employee for the calendar year takes effect with—

(i) The date of the beginning of the first payroll period ending on or after the date on which the certificate is received by the employer;

(ii) the date of the first payment of wages made without regard to a payroll period on or after the date on which the certificate is received by the employer; or

(iii) The first day of the calendar year for which the certificate is furnished; if that day is later than the otherwise applicable effective date specified in subdivision (i) or (ii) of this paragraph (c)(1).

(2) *Previous certificate.* Except as otherwise provided in this paragraph (c) (2), and earned income credit advance payment certificate furnished the employer where a previous certificate is or has been in effect with the employer for that employee for the calendar year takes effect on the date of the first payment of wages made on or after the first status determination date (as defined in paragraph (c)(4) of this section) occurring at least thirty days after the date on which the certificate is received by the employer. However, if the employer so chooses, the employer may treat the certificate as effective on the date of any payment of wages made on or after the date on which the certificate is received by the employer (without regard to any status determination date).

(3) *Certificate of spouse.* For the sole purpose of applying paragraph (a)(3) of this section, in determining if a certificate is in effect with respect to an

employee's spouse, the spouse's certificate is treated as then in effect if the spouse's certificate will be or is reasonably expected to be in effect on the first status determination date following the date on which the employer receives the employee's certificate.

(4) *Status determination date.* For the purposes of this section, the term "status determination date" means January 1, May 1, July 1, and October 1 of each year.

(d) *Period during which certificate remains in effect; change of status—(1) Period certificate remains in effect.* An earned income credit advance payment certificate which takes effect during a calendar year continues in effect with respect to the employee only during that calendar year and until revoked by the employee or until another certificate takes effect. See paragraphs (d)(2) and (c)(2) of this section.

(2) *Change of status—(i) Revocation of certificate.* If, after an employee has furnished an earned income credit advance payment certificate—

(A) The employee no longer wishes to receive advance earned income credit payments; or

(B) There has been a change of circumstances which has the effect of either making the employee ineligible for the earned income credit for the taxable year or causing a certificate to be in effect for the employee's spouse, then the employee must revoke the certificate previously furnished by furnishing the employer a new certificate (Form W-5 or identical form) in revocation of the earlier certificate. Depending upon the nature of the change of circumstances, the employer may be required, pursuant to the new certificate, to pay further advance earned income credit amounts to the employee (but in different amounts than previously paid to the employee). The Form W-5 (or identical form) must be prepared in accordance with the instructions applicable thereto and must set forth fully and clearly the data therein called for. In the case of revocation due to change of circumstances, the new certificate in revocation must be delivered to the employer within ten days after the employee first learns of the change of circumstances. The new certificate is effective under the rules provided in paragraph (c)(2) of this section for later certificates. A new certificate furnished by an employee which is invalid within the meaning of paragraph (b)(2) of this section nevertheless operates to revoke the earlier certificate but is otherwise considered a nullity with respect to all payments of wages thereafter to the

employee. The employer is not required to ascertain whether any employee has experienced a change of circumstances described in subdivision (i)(B) of this paragraph which necessitates the employee's furnishing a new certificate. However, the employer should inform the district director if the employer has reason to believe that an employee has experienced a change of circumstances as described if the employee does not deliver a new certificate to the employer within the ten day period.

(ii) *Change in spouse's certificate.* If, after an employee has furnished an earned income credit advance payment certificate stating that a certificate is in effect for the spouse of the employee, the certificate of the spouse is no longer in effect, the employee may furnish the employer with a new certificate which reflects this change of circumstances.

§ 31.6302-1 Use of Government depositaries in connection with taxes under Federal Insurance Contributions Act and income tax withheld.

The periods within which FICA taxes and withheld income taxes must be deposited under § 31.6302-1 are determined, in the case of employers paying advance earned income credit amounts, by reference to the amount of taxes required to be deposited after reduction for advance amounts paid to employees.

There is a need for immediate guidance with respect to the provisions contained in this Treasury decision. For this reason, it is found impracticable to issue it with notice and public procedure under subsection (b) of section 553 of title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

This Treasury decision is issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

Jerome Kurtz,

Commissioner of Internal Revenue.

Approved: April 27, 1979.

Donald C. Lubick,

Assistant Secretary of the Treasury.

[T.D. 7819]

[FR Doc. 79-14493 Filed 5-4-79; 4:57 pm]

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Bureau of Alcohol, Tobacco, and Firearms

27 CFR Part 71

Requests or Demands for Disclosure

AGENCY: Bureau of Alcohol, Tobacco and Firearms.

ACTION: Final rule.

SUMMARY: This Treasury decision adds a new section to the Statement of Procedural Rules and makes conforming changes. The new section deals with Bureau procedure for handling requests or demands for disclosure of ATF information.

EFFECTIVE DATE: May 9, 1979.

FOR FURTHER INFORMATION CONTACT: Steven C. Simon, Research and Regulations Branch, Bureau of Alcohol, Tobacco and Firearms, Washington, DC 20226; 202-566-7626.

SUPPLEMENTARY INFORMATION:

Currently, the regulations governing requests or demands for disclosure of ATF information (other than disclosure procedures for Freedom of Information and Privacy Act requests, which are covered by 27 CFR Part 71) are found in 26 CFR § 301.9000-1. This section deals primarily with the Internal Revenue Service, and is couched in terms of internal revenue records and authority of the Commissioner in testimony matters. These terms are often found to be cumbersome and confusing to State courts and others. Consequently, it is considered advisable to add regulations to 27 CFR Part 71, which will be identical in substance with the current regulations in § 301.9000-1, but will have altered terminology to reflect their application to the Bureau of Alcohol, Tobacco and Firearms. Non-substantive conforming changes, required by addition of the new regulations, are also being made at this time.

Because these regulations relate to agency management and personnel within the meaning of 5 U.S.C. 553(a), the Bureau finds that the requirements of 5 U.S.C. 553(b) and (d), dealing with notice of proposed rulemaking and effective date limitation, are not applicable. Accordingly, the regulations shall become effective on the date of publication of this Treasury decision in the Federal Register.

The drafter of this document was Steven C. Simon of the Research and Regulations Branch, Bureau of Alcohol, Tobacco and Firearms. However, supervisors and reviewers from both the Bureau and the Department of the Treasury exercised control over the development of the regulations, both as to matters of substance and style.

This Treasury decision is issued under the authority contained in 5 U.S.C. 301.

Accordingly, the Statement of Procedural Rules, 27 CFR Part 71, is amended as follows:

§ 71.26 [Amended]

Paragraph A. Section 71.26 is amended as follows: